IN RE: UNITED STATES V. PHILIPP BROTHER, INC. AND FEDERAL-HOFFMAN, INC. (S.D. Ill.)
D.O.J. Ref. No. 90-11-3-608B

COMMENTS OF CERTAIN COMPANIES TO THE PROPOSED CONSENT DECREE BETWEEN THE UNITED STATES AND PHILIPP BROTHER, INC. AND FEDERAL-HOFFMAN, INC.

INTRODUCTION

These comments are being submitted by a group of defendants (the "Companies")[1] in the lawsuit entitled United States v. NL Industries, Inc., et al., (Civ. Action No. 91-578-JLF) (S.D. Ill.) (the "Lawsuit").[2] As described more fully below, the proposed Consent Decree lodged with the Court in the matter referenced above (the "Proposed Decree") is inconsistent with the decision by the United States to reopen the administrative record at the Site. The parties in the Lawsuit conducted extensive settlement negotiations with the aid of the Court, culminating in a stay of the litigation pending dissemination of the Granite City Health Study ("Health Study") and reopening the administrative record. The United States has decided to review all relevant comments submitted during the comment period and to decide the matter accordingly. Nevertheless, the United States Environmental Protection Agency ("EPA") appears intent on settling with two large volume potentially responsible parties ("PRPs") for low amounts. In

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[1] The Companies include NL Industries, Johnson Controls, AT&T, Exide, Allied-Signal, and General Battery.

[2] The Lawsuit, brought by the United States on July 31, 1991, relates to the NL Industries/Taracorp Superfund Site (the "Site") located in Granite City, Illinois.

light of the circumstances discussed below, EPA's pass at partial settlement of this matter appears to be no more than a backhanded effort to shore up its case against the defendants in the Lawsuit. Given the fact that settlement of the latter suit is rendered even more difficult by EPA's short-sighted strategy, the Proposed Decree should be withdrawn.

BACKGROUND

All of the Companies except for NL Industries ("NL") were identified as PRPs in 1989 and were named as such because they allegedly sent lead-containing material to the Site for resource recovery.[3] These Companies are part of a much larger group of approximately 350 PRPs known as "customer PRPs." Philipp Brother and Federal-Hoffman, the subject of the Proposed Decree, are two of these "customer PRPs."

In June of 1990, the EPA developed a listing of PRPs from a customer list provided by NL (the "PRP list"). See Exhibit A. The PRP list ranked the PRPs by the amount of material allegedly sent to the Site during a certain time period. Of the more than 350 customer PRPs on the PRP list, Philipp Brother is ranked number 9 and Federal-Hoffman is ranked number 10. The PRP list estimates that Philipp Brother's allocation is approximately 1.9% of all of the material sent to the Site, and

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[3] NL had been named as a PRP at an earlier time because it was a prior owner of the Site and operated the lead smelter for many years.

Federal-Hoffman's allocation is approximately 1.8%, a total of about 3.7%.

THE PROPOSED CONSENT DECREE

The Proposed Decree was negotiated between the United States and Philipp Brother and Federal-Hoffman to satisfy Philipp Brother's and Federal-Hoffman's liability for past and future response costs for the cleanup of the Site as set forth in the Record of Decision ("ROD"). The Proposed Decree also settles Philipp Brother's and Federal-Hoffman's liability for penalties.[4] Philipp Brother and Federal-Hoffman have together agreed to pay the government $136,000 in penalties, $115,200 for past response costs, and $748,800 for future response costs. Proposed Decree, Section VII, ¶20. Thus, except for a few reopeners, the Proposed Decree, if entered, would allow Philipp Brother and Federal-Hoffman to effectively "cash-out" out of the Site.

STANDARD OF D.O.J. REVIEW

Pursuant to 42 U.S.C. § 9622(d)(2)(B) and 28 C.F.R. § 50(7)(b), the Department of Justice ("D.O.J.") is to review all comments to a proposed consent decree and withhold or withdraw its consent based on disclosed facts or considerations which indicate that the proposed decree is either inappropriate, improper, or inadequate. The Companies request that D.O.J.

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[4] The United States seeks to impose penalties on all of the defendants in the Lawsuit for failure to comply with an administrative order issued against them (and 39 other PRPs) on November 27, 1990. Philipp Brother and Federal-Hoffman were two of the other 39 parties that received the administrative order.

withdraw its consent to the Proposed Decree because it is inappropriate, improper, and inadequate.

THE PROPOSED DECREE IS INAPPROPRIATE, IMPROPER, AND INADEQUATE

The Proposed Decree is a "cash-out" settlement. In exchange for paying a portion of the response costs up front, Philipp Brother and Federal-Hoffman would be permitted to walk away from the Site without any future liability or responsibility for matters covered in the Proposed Decree. Given the unusual nature of such an arrangement, especially for non de minimis parties, EPA has cautioned that "[c]ash out settlements are not preferred." Enforcement Project Management Handbook, U.S. EPA, May 1993, OSWER Dir. No. 9837.2B, Chapter VIII, page 15 (hereinafter "Enforcement Handbook"). Indeed, according to EPA, "once a Fund-lead response action is ongoing," as is the case at the NL Site, "the potential benefit of mixed funding as a means of expediting cleanup is largely eliminated." Evaluating Mixed Funding Settlements under CERCLA, U.S. EPA, OSWER Dir. No. 9834.9, 53 Fed. Reg. 8279, 8283 (March 14, 1988) (hereinafter "Mixed Funding Guidance").[5]

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[5] The Companies question whether the United States has authority to enter into non de minimis cash out settlements. The United States' settlement authority for CERCLA cases is listed in § 122 of CERCLA. 42 U.S.C. § 9622. Section 122(a) expressly authorizes settlements where PRPs conduct the remedial action. Section 122(b) expressly authorizes mixed funding settlements. Section 122(g) expressly authorizes de minimis settlements. Cash out settlements, on the other hand, are not expressly authorized anywhere in CERCLA.

When considering accepting a cash-out settlement, EPA has stated that the key issues are as follows:

1. The percentage of the total costs to be paid by settlors (i.e., a substantial portion should be offered);

2. The Agency's level of confidence in information related to liability and cost estimates at the time of settlement;

3. Equitable considerations for both the settling and non-settling parties, including the nature of any covenants not to sue in the cash-out settlement.

Mixed Funding Guidance, 53 Fed. Reg. at 8283 (emphasis supplied); see also Enforcement Handbook, Chapter VIII, page 15 (listing similar factors).

When evaluated in light of these factors, the Proposed Decree does not appear to be appropriate, proper, or adequate. For example, the first factor states that a substantial portion of the total costs should be offered. Under the Proposed Decree, Philipp Brother and Federal-Hoffman would pay $1,000,000, only $864,000 of which would be devoted to response costs. EPA estimates that the remedy at the Site will cost approximately $30 million; based on the cost to EPA of cleaning up certain residences to date, the Companies have heard that the remedy set forth in the current ROD could cost as much as $300 million. Even if EPA's original cost estimate is used, Philipp Brother and Federal-Hoffman would pay less than 3% of the remedial costs; if the $300 million estimate is used, that figure drops to less than

0.3%. In neither case would the contribution represent a "substantial portion" of the total cost.

Indeed, this proposed settlement is particularly disturbing given that the United States previously received and rejected at least three offers to conduct a substantial portion of the work at the Site. In August 1990, a large group of customer PRPs, including both Philipp Brother and Federal-Hoffman, offered to conduct the entire remedial action except for the disputed residential soil cleanup. In December 1990, a smaller group of customer PRPs, including Federal-Hoffman, offered to conduct 35% of the work at the Site. In January 1991, several PRPs, including Philipp Brother, agreed as part of a compromise to conduct the entire remedial action subject to the PRPs being allowed to conduct a tilling pilot study to determine whether tilling would be an appropriate remedy for residential soils above 500 ppm lead. Given that EPA rejected more substantial offers in which Philipp Brother and Federal-Hoffman participated, one can only conclude that the United States is using this proposed settlement to bolster its case against the defendants in the Lawsuit.

In addition, the second factor listed above includes the Agency's level of confidence in the cost estimate. Given recent events related to the remedy at the Site, it is hard to imagine how EPA could have much confidence in its cost estimate for the remedial work. For example, once the results of the

Health Study are released, EPA plans to reopen the comment period so that the Companies and the public will have an opportunity to submit comments on the remedy, including the residential soil cleanup level. EPA must evaluate the comments and make appropriate changes to the remedy based on sound scientific principles. It is unclear how EPA could have much confidence in its cost estimate when it has not even received and evaluated comments from the new comment period.

Furthermore, in May of this year, EPA issued an Explanation of Significant Differences ("ESD") for the Site. The ESD pertains to the disposal of battery case materials and associated soils in certain locations in Granite City, Venice, and Madison. Initially, the ROD required consolidation of this material with the Taracorp pile. However, due to groundwater concerns, the ESD now requires that this material be disposed of off-site in a permitted landfill. The Companies understand that EPA is evaluating a similar change for the disposal of the residential soils. As EPA itself recognizes, these changes could increase the cost of the remedy significantly, again putting into question EPA's cost estimate.

Under the third factor, EPA should consider equitable factors, including any covenants not to sue, as it assesses whether to accept a cash-out settlement. EPA has stated that the scope of a particular covenant not to sue should be based on the sufficiency of EPA's information on the "nature, stage of

development and the cost of the potential remedy." Mixed Funding Guidance, 53 Fed. Reg. at 8283. The covenant not to sue in the Proposed Decree appears to cover liability for the residential soil remediation. As stated above, the Companies and the public will soon have the opportunity to comment on residential soil remediation issues, and EPA must objectively evaluate those comments and may very well change the remedy as a result of those comments. A broad covenant not to sue for residential soil remediation does not seem appropriate at this time given the uncertainty in the nature and the cost of the remedy.

The third factor also includes equitable considerations for non-settling parties. The Proposed Decree is unfair to the non-settling parties because the proposed payment is unreasonably low when compared to Philipp Brother's and Federal-Hoffman's volumetric allocation. Philipp Brother and Federal-Hoffman are ranked number 9 and 10 on the PRP list with an allocation of 1.9% and 1.8% respectively. The Proposed Decree calls for a remedial payment of $864,000, which is only 2.9% of EPA's $30 million cost estimate and only 0.29% of the $300 million estimate. Considering that Philipp and Federal-Hoffman have a combined allocation of 3.7% and that this Site, like most CERCLA sites, has a large number of non-viable PRPs, the $864,000 remedial payment in the Proposed Decree is unreasonably low and unfair to the non-settling parties. When PRPs "cash out" of a CERCLA site, they are usually forced to pay a premium, perhaps as high as three times their fair share, to offset the government's risk due

to remedy failure or cost overruns. See Mixed Funding Guidance, 53 Fed. Reg. at 8283. Instead of paying a premium, Philipp Brother and Federal-Hoffman seem to be getting a bargain.

In addition, the Proposed Decree is unfair to the non-settling parties in its assessment of a $136,000 penalty. As described above, Philipp Brother and Federal-Hoffman are already paying an unreasonably low settlement amount for remedial costs. By allocating $136,000 for penalties rather than response costs, the Proposed Decree decreases Philipp Brother's and Federal-Hoffman's contribution to the remedy by more than 13%. Indeed, as the Court noted in a February 1992 status conference, any penalty payment to the United States is not appropriate in this case. Given that no penalty is appropriate in this case and the settling parties themselves have no reason to care how the money is distributed among categories by the government as long as it represents an underpayment, the United States is simply attempting to bolster its penalty case against the defendants in the Lawsuit by including a penalty payment in the Proposed Decree. The Court in the Lawsuit decided that the remedy issue would be tried first with other issues, including penalties, to be tried later. The United States should not attempt to indirectly try the penalty issue now by including a penalty issue in the Proposed Decree. This money would be better spent on the remedy instead of on attempts to create a "penalty precedent" against the Lawsuit defendants.

CONCLUSION

In order for a proposed consent decree to be finally entered, it must be approved by a federal court. The court must review the proposed decree to determine if it is fair, reasonable, and consistent with the objectives of CERCLA. United States v. Hercules, Inc., 961 F.2d 796, 800 (8th Cir. 1992); United States v. Cannons Engineering Corp., 899 F.2d 79, 85 (1st Cir. 1990). Part of this fairness review involves a determination of whether the PRP is paying for its share of the harm done. Cannons Engineering, 899 F.2d at 87. It is the government that must supply a plausible explanation for how it arrived at the settlement amount. Id.

The Companies believe that if a court were to review the Proposed Decree, it would be forced to conclude that this standard has not been met. The Proposed Decree is unfair and the settlement amount is unreasonably low given the uncertainty of the nature and the cost of the remedy. Cf. United States v. Hardy, 1992 U.S. Dist. LEXIS 17329, *7 (W.D. Ky 1992) (Denying motion for entry of consent decree in part because "[t]he figures which represented best guess approximations of cost were obsolete as to all parties at the time the Decree was lodged with the court.") In addition, the United States has violated its own guidance by entering into the proposed settlement with Philipp Brother and Federal-Hoffman. The Companies, therefore, request that D.O.J. withdraw consent to the Proposed Decree.